STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Michael Talbot, C.J., and Kirsten Frank Kelly, Deborah A. Servitto, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Nos. 153115; 153117

MICHAEL CHRISTOPHER FREDERICK, and
TODD RANDOLPH VAN DOORNE
Defendants-Appellants.

Kent CC: 14-003216-FH
COA Nos. 323642; 323643

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Was entry onto the curtilage of the defendants' homes to approach the door to speak to each at their respective premises a search, where that which was sought was consent to search from each occupant, not evidence or other information concerning the premises independent of that consent?

Amicus answers: NO

Statement of Facts

Amicus adopt the Statement of Facts of the People.

Argument

I.

The entry onto the curtilage of the defendants' homes to approach the door to speak to each at their respective premises was not, even if a trespass, a search, as that which was sought was consent to search from each occupant, not evidence or other information concerning the premises independent of that consent.

A. Introduction: the Court's questions, and the answers of the amicus

In its order directing supplemental briefing, this Court has directed these issues be briefed:

- whether the knock-and-talk procedures employed by the law enforcement officers violated the general public's implied license to approach the defendants' residences and constituted unconstitutional searches in violation of the Fourth Amendment, see Florida v. Jardines, 569 U.S. ——; 133 S Ct 1409, 1416 n 3, 1422; 185 L.Ed.2d 495 (2013);

- whether the conduct of the law enforcement officers "objectively reveals a purpose to conduct a search" to obtain evidence without the necessity of obtaining a warrant, id. at 1417; and

- whether the conduct of the law enforcement officers was coercive, see United States v. Spotted Elk, 548 F3d 641, 655 (CA 8, 2008).

Amicus answers that 1) the entries by the officers here were licensed, but *if* the officers' entry in each case onto the curtilage to knock on the door violated the general public's implied license to approach the defendant's residences because of its timing, it constituted at most a trespass, but not a search, because 2) the officers did not have, objectively viewed, a purpose to search, but a purpose to *request consent* to search, and would have left if consent had not been given;[1] further 3) the consent searches

[1] The Court has asked "whether the knock-and-talk procedures employed by the law enforcement officers violated the general public's implied license to approach the defendants' residences and constituted unconstitutional searches in violation of the Fourth Amendment." But an unlicensed entry does not necessarily constitute a search under the Fourth Amendment;

were valid, as consent was voluntarily given under the totality of the circumstances. Moreover, unlike in the *Jones* and *Jardines* cases, to be discussed below, not only was there no purpose to search when each entry onto the curtilage occurred, but here no information regarding the premises or the curtilage was *obtained* as a result of the entries, the evidence being the fruit of the search made on the voluntary consents.

B. The re-emergence of a property-based understanding of the Fourth Amendment; a trespass is not a search, and so even if unlicensed the entry to seek consent to search here was not itself a search

1. *Jones*, trespass to chattels, and searches

In *United States v. Jones*[2] FBI agents obtained a warrant to install a GPS tracking device on the undercarriage of Jones's Jeep vehicle. The warrant authorized installation of the device in the District of Columbia within 10 days. The warrant was not installed until the 11th day, and in Maryland, rather than the District of Columbia. The attachment of the device, then, was treated by the Court as warrantless. Data concerning Jones's movements obtained from the GPS device was admitted at his trial on a drug-trafficking conspiracy. The government's argument for admissibility was that there was no constitutional issue, as no search had occurred at all under the Fourth Amendment, defendant having no reasonable expectation of privacy in his movements on public streets. The Supreme Court disagreed, saying that "installation of a GPS device on a target's vehicle, *and its use* of that device to monitor the vehicle's movements, constitutes a 'search.'"[3] The Court so found because, it said, the government had "physically occupied private property [attaching the

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answering the Court's second question affirmatively is necessary to that conclusion.

[2] *United States v. Jones*, __U.S.__, 132 S. Ct. 945, 181 L. Ed.2d 911 (2012).

[3] *Jones*, 132 S.Ct. At 949 (emphasis supplied).

device on the vehicle], *for the purpose of obtaining information*."[4] The "text of the Fourth Amendment reflects its close connection to property," and so Jones's Fourth Amendment rights did not "rise or fall with the *Katz* formulation"[5] of a reasonable expectation of privacy in the undercarriage of his vehicle, the *Katz* test being an addition to, not a substitute for, "the common-law trespassory test."[6] Because the government had committed a trespass to chattels—"physically occupied private property"—*for the purpose of gaining information* by attaching the GPS device, a search had occurred.[7] But the Court was quite clear that "[t]respass alone does not qualify" as a Fourth Amendment search, and so it was not the mere attachment of the device to Jones's vehicle that constituted a search. Rather, said the Court, there must be "conjoined" with trespass "an attempt to find something or to obtain information."[8]

In *Jones*, then, there was 1) a trespass to a constitutionally protected "effect" of Jones, the Fourth Amendment protecting persons, houses, papers, and effects; 2) for the purpose of obtaining information of Jones's movements; which 3) was successful in obtaining that information. In other words, a search, not simply a trespass—under *Jones* had an officer affixed a flier under the windshield wiper Jones's auto advertising sale of tickets to a police benefit, that action would have

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[4] *Jones*, 132 S.Ct. At 949 (emphasis supplied).

[5] *Jones*, 132 S.Ct. At 950.

[6] *Jones*, 132 S.Ct. At 951.

[7] Whether the search in *Jones* was reasonable without warrant, and whether a lesser standard than probable cause for installation is required, were questions the Court did not reach, the Government not having raised them below.

[8] *Jones*, 132 S. Ct. at 951.

technically constituted a trespass, but it would not have been a search—was undertaken, which produced fruit.

2. *Jardines*, trespass to the curtilage, and searches

Based on a tip, detectives in *Florida v. Jardines*[9] went to the residence of Jardines, and a detective approached the home with a trained drug-sniffing dog. It was, objectively and subjectively, the purpose of the detective to gain information regarding Jardines's premises by bringing the drug-sniffing dog onto the curtilage, just as it was the purpose of the FBI to gain information regarding Jones's movements by the placement of the GPS device on his vehicle. As the approach was made, the dog sensed an odor he had been trained to seek out. The detective gave the dog the play of his leash, and the dog ultimately sat after sniffing the base of the front door of Jardines's house, which was that which the dog was trained to do after discovering the strongest point of origin of the odor.[10] Information thus had been obtained *regarding the premises* from the warrantless entry onto the curtilage, which was the detective's purpose in entering the curtilage. But was this successful purpose to obtain information conjoined with a trespass, so as to constitute a search under the Fourth Amendment?

It was uncontested that there had been an entry onto the curtilage—the area "'immediately surrounding and associated with the home'—what our cases call the curtilage"—a part of the "house" protected by the Fourth Amendment, for "[t]he front porch is the classic exemplar of an area

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[9] *Florida v. Jardines*, __U.S.__, 133 S.Ct. 1409, 185 L. Ed.2d 945 (2013).

[10] The dog was pulled away, and a search warrant obtained, the execution of which revealed marijuana plants. *Jardines*, 133 S. Ct. at 1413.

adjacent to the home and 'to which the activity of home life extends.'"[11] Because, then, there had been an entry onto an area protected by the Fourth Amendment, the question was, said the Court, "whether it was accomplished through an unlicensed physical intrusion,"[12] for if licensed the entry was implicitly consensual. What, then, determines license?

License may be implied, the Court continued, "'from the habits of the country,' notwithstanding the 'strict rule of the English common law as to entry upon a close.'" And so even unwelcome entries may be licensed by the habits of the country, "'justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'"[13] This license is implicit, and "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[14] Though again recognizing that the implicit license may extend to the unwelcome—to "find a visitor knocking on the door is routine (even if sometimes unwelcome)"—the Court said that the scope of the license is "limited not only to a particular area but also to a specific purpose."[15] The "background social norms that invite a visitor to the front door do not invite him there *to conduct a search*. . . . the question before the Court is precisely *whether* the officer's conduct was an objectively reasonable search. . . . that depends upon whether the officers had an implied license to enter the porch, which

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[11] *Jardines*, 133 S. Ct. at 1415.

[12] *Jardines*, 133 S. Ct. at 1415.

[13] *Jardines*, 133 S. Ct. at 1415.

[14] *Jardines*, 133 S. Ct. at 1415-16.

[15] *Jardines*, 133 S. Ct. at 1416.

in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had a license to do. . . . the background social norms that invite a visitor to the front door do not invite him there to conduct a search."[16] There is no customary invitation to bring a trained police dog to explore the area around the home in the hope of discovering evidence "or something else."[17]

Was the police entry here proper because a police officer not armed with a warrant may approach a home and knock, as that is no more than any private citizen might do, or was it for some reason unlicensed? If unlicensed, amicus submits, it could only be so found because of the time of day of its accomplishment, but even if unlicensed, an unlicensed entry onto the curtilage does not constitute a search—a trespass alone not being a search—the entry constituting a search only if to it had as a purpose to accomplish the obtaining of information regarding the premises. Here the entry had no such purpose. While it may have been the *hope* of the officers to gain information regarding the premises, that hope was predicated on the obtaining of a proper consent from the occupant in each case, failing which they intended to leave. The hope may have been to learn something regarding the contents of the premises, but the purpose was to seek consent. The officers did not seek to gain information regarding the premises *from the entry itself*, unlike with the detective in *Jardines,* whose entry with the trained dog was for precisely that purpose, and unlike the FBI in *Jones*, where placement of the GPS device on Jones's vehicle was for the purpose of obtaining information of Jones's movements. Here, an authorization by an occupant was required,

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[16] *Jardines*, 133 S. Ct. at 1416-17.

[17] *Jardines*, 133 S. Ct. at 1416.

and if not given, the entry was to *end*. *If*, then, there was a trespass, there was no search, as the entries of the houses and searches of the premises were predicated on a valid consent.

C. The entries onto the curtilage here were not searches, as the conduct of the law enforcement officers objectively reveals a purpose other than to "conduct a search to obtain evidence without the necessity of obtaining a warrant"; that is, a purpose to seek consent to search, rather than, through the entry itself, a purpose to gain evidence or other information concerning the property, as in *Jardines*

As the *Jardines* dissenters observed, even the majority recognized that the implied license to approach the door of a house is not "restricted to categories of visitors whom an occupant of the dwelling is likely to welcome," and "extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions)."[18] Surely no one would take the view that police officers in the performance of their duties may not, in investigating an established or suspected crime, knock on the doors of possible witnesses or even suspects to ask questions, even questions the answers to which might prove incriminating.[19] Both *Jones* and *Jardines* look to the *purpose* of the "interference" with personal property or entry onto the curtilage. In *Jones*, the Court said that a trespass to the chattel was not alone enough to constitute a violation of the Fourth Amendment; there must be "conjoined" with the trespass "an attempt to find something or to obtain information." And in *Jardines* the Court said that an otherwise licensed entry into the curtilage—a police officer may go up to the door in as may any private citizen to make inquiry on any subject, welcome or not—is unlicensed, and therefore within the Fourth Amendment, if the police behavior "objectively reveals a purpose to *conduct* a search." The Court in *Jardines* also referred to this

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[18] *Jardines*, 133 S. Ct. at 1420 (Alito, J., dissenting).

[19] "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 1862, 179 L.Ed. 2d 865 (2011).

"unlicensed" conduct as gathering information in an area belonging to Jardines and immediately surrounding his house."[20]

An implied license for police entry onto the curtilage for "police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions)," which includes requesting a voluntary consent to search, has uniformly been understood to exist; nothing in *Jardines* in any way undermines this understanding.[21] That the police wish to ask incriminating questions, or ask for consent to search does not itself constitute a search, as the police have done nothing but walk to the door to inquire, as any citizen might do. Again, the police may *hope* to search, but the *purpose* of the entry itself is not to gain evidence from the fact of the entry on the curtilage,[22] but to

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[20] *Jardines*, 133 S. Ct. at 1414.

[21] As the Court of Appeals here put it, "even post-*Jardines,* an officer may conduct a knock and talk with the intent to gain the occupant's consent to a search or to otherwise acquire information from the occupant. That an officer intends to obtain information from the occupant does not transform a knock and talk into an unconstitutional search." *People v. Frederick*, __Mich. App.__, 2015 WL 8215150 (2015) (slip opinion, at 7).

See also *United States v. Carloss*, 818 F.3d 988, 994 (CA 10, 2016) (" Since *Jardines,* the Tenth Circuit has continued to uphold the constitutionality of knock-and-talks, based on the implied license recognized in *Jardines* that allows police officers, like members of the public, to approach the front door of a home and knock"); *United States v. Shuck,* 713 F.3d 563, 567 (CA 10, 2013); *Smith v. City of Wyoming*, __F.3d__, 2016 WL 1533998, at 9 (CA 6, 2016), ("Knocking on the front door of a home in order to speak with the occupant—a so-called 'knock and talk'—is generally permissible. . . . Though the threshold of a house is especially protected by the Fourth Amendment . . . and police may not gather information even from a person's front porch without authorization, *Florida v. Jardines,* . . . the police are authorized to conduct a 'knock and talk' for as long as they have consent. . . . When an officer coerces a person to answer his questions, or forces his way into a private home, he exceeds the scope of a consensual 'knock and talk' and thus intrudes on Fourth Amendment rights"); *State v. Christensen*, __S.W.2d__, 2015 WL 2330185 (Tenn.Crim.App., 2015).

[22] As the Court put it in *Jardines* explaining why a search had occurred: "[t]hat the officers learned what they learned only by physically intruding on Jardines' property *to gather evidence* is enough to establish that a search occurred." *Jardines*, 133 S. Ct. at 1417 (emphasis supplied).

gain evidence if and only if the occupant grants consent, or, in the case of asking incriminating questions, agrees to answer. But in either case, asking incriminating questions or seeking consent, *that* is the purpose of the entry, and any evidence results only upon the occurrence of a further event, the voluntary cooperation of the occupant to either answer the questions or allow the search. There was, in the present cases, no intent to, by the entry itself, "gather information" from an area belonging to an individual and immediately surrounding the house (the curtilage), or the home itself.

The facts here demonstrate that the entry of the officers in these two cases fall exactly within those recognized licensed entries to ask questions, even potentially incriminating questions, or seek consent to search. The officers indeed had reasons for seeking consent rather than immediately obtaining a search warrant, as well as for acting as soon as possible. As a courtesy to the Kent County Sheriff Department employees, the officers wished to avoid their names being made part of the public record at that time by inclusion in a search warrant. Further, a search warrant, testimony indicated, is generally more intrusive than a consent search. Action was deemed appropriate immediately because, given the nature of the contraband, there was a potential for its removal or destruction. When seeking a voluntary consent at a dwelling, the officers understood that "you knock on the door, make contact with somebody, advise them what the issue is, see if you can come inside and talk about the issue. . . . . They can say, no, I don't want to talk to you. Then we go away."

The only fact here, then, that could render the entries onto the curtilage to knock on the doors of these defendants unlicensed is the time of day; the officers knocked on Frederick's door at approximately 4 a.m., and that of Van Doorne at approximately 5:30 a.m., after concluding their business at Frederick's. The Court of Appeals agreed that "the time of a visit by police officers may be relevant when evaluating the constitutional validity" of the officers' entry to request consent to

search, but did not read *Jardines* as "adopting any sort of bright-line rule that prohibits officers from entering an area protected by the Fourth Amendment at certain times of day."[23] Rather, the court concluded

> it is not simply the presence of a person at a particular time, but rather, the reaction that a typical person would have to that individual's presence, that determines whether the scope of the implied license has been exceeded. How a typical person would react depends on more than the time of day. For example, the implied license at issue here might not extend to a midnight visitor looking through garbage bins or peeking in the windows. But it may well extend to a midnight visitor seeking emergency assistance, or to a pre-dawn visitor delivering the newspaper. Similarly, while a typical person may well find the presence of uniformed police officers on their doorstep in the early hours of the morning "unwelcome," we cannot conclude that it is, without more, the type of circumstance that would lead an average person "to—well, call the police."[24]

It was on this point that the majority and dissent disagreed. Amicus believes the majority has the better of the argument here, and leaves further argument on the point to the People.

But even if the dissent in this case is correct that the time of the entries to knock on the doors to request consent to search rendered the entries unlicensed, that the entries were, if this is so, technically a trespass, does not render them a search, as amicus has said. There must be conjoined

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[23] *People v. Frederick*, slip opinion at 14. The court distinguished *United States v. Lundin*, 47 F.Supp.3d 1003 2014), where a 4 a.m. approach and knock was held improper, because there, as the district court said, " '[j]ust as the officers' clear purpose in Jardines—to search the curtilage for evidence—could not be pursued without a warrant, so too was the officers' clear purpose in this case—to arrest a suspect within his home—a goal whose attainment requires a warrant.'" *People v. Frederick*, slip opinion at 11. *Lundin* was affirmed by the Court of Appeals, *United States v. Lundin*, 817 F.3d 1151 (CA 9, 2016).

[24] *Id.* (footnotes omitted).

with the trespass a purpose to find evidence or some other thing.[25] A purpose to talk to the occupant, even to ask potentially incriminating questions, or to seek his or her voluntary consent to search, is not a purpose to discover evidence concerning the premises, including the curtilage, *from the accomplishment of the entry itself*, as with entry with a drug-sniffing dog. If that were so, the time of the entry could make no difference whatever. *Jardines* holds that an entry onto the curtilage with a purpose to search is unlicensed, and if asking questions or seeking consent to search constitutes a purpose to search, then the time of day is irrelevant, and the police are prohibited from knocking on a door and asking questions or seeking consent to search no matter the time of day. An entry at high noon to ask for consent to search would be unlicensed and an improper warrantless search if a purpose to *seek* voluntary consent is considered an entry with a purpose to conduct a search. But that is not so, because neither asking questions nor seeking consent to search are themselves searches, and entering for the purpose of asking questions or seeking consent to search is not a purpose to search. If the entries here are considered unlicensed because of their timing, then in these

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[25] One might ask whether there is any limiting principle here; that is, could one trespass even *criminally*, as by entering the house itself without the owner's permission, seeking only to find the owner to request consent to search, not intending to search the premises for evidence? Indeed, this question arose at oral argument in *People v. Radandt*, No. 150906. Alas, wisdom sometimes comes late, but "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting). In *Radandt* it came as the end of time of argument was called. But *of course* there is a limiting principle. When a law enforcement officer enters a dwelling without consent because he or she wishes to inquire of the occupant or request consent to search from the occupant and no one has answered the door, that entry is no longer an inquiry *at* the premises, but now has become a trespass with a purpose to search, that search being of the house *for the occupant* (*Jardines* speaks of a purpose to discover evidence or "something else"). A warrantless entry into the premises to search for the occupant is a search. A warrantless entry onto the curtilage to make inquiry at the house from an occupant is not a search, even if the attempt to contact the occupant leads to knocking at more than one door. See *Radandt*.

case the entries, not being conjoined with a purpose to search, are not searches, but at most technical trespasses. The question here is whether the consents given were voluntary, and while perhaps the time at which they were requested may be relevant to *that* inquiry, see D., infra, the fact of a technical trespass itself is not a constitutional violation of any sort, not, standing alone, being a search.

Under *Jardines*, amicus submits, a police entry onto the curtilage becomes a search only when the purpose of the entry is to make some attempt to acquire information from the *residence*, including its curtilage, *by the entry itself*, rather than from the occupant or resident. Again, the Court referred to the unlicensed conduct as "gathering information *in an area* belonging to Jardines and *immediately surrounding his house*." There was no trespass here, nor, even if there was, any search. The police entered with a purpose to request to search, hoping that it would be granted, and with an understanding that if consent was refused they were required to leave. The question is whether the consent granted was voluntary, and it was.

D. The conduct of the law enforcement officers was not coercive, and the consents to search were voluntarily given

This Court has asked "whether the conduct of the law enforcement officers was coercive, see *United States v. Spotted* Elk, 548 F3d 641, 655 (CA 8, 2008)." *Spotted Elk* provides a good comparison. There, several defendants were charged with various drug and gun crimes. The manager of a motel called the police when he smelled what he believed to be burning marijuana in the hall of the motel. The smell appeared to be coming from rooms 131 and 133. No one answered officers' knocks on room 131, but defendant Blue Bird answered at room 133, and allowed an officer to enter the room. The officer smelled marijuana, and saw a baggie with four hand-rolled cigarettes.

When Blue Bird gave her name, she volunteered that there was a warrant out for her arrest. As the officer prepared to arrest Blue Bird, he asked if she had anything on her person that could "stick him," and she said that she had cocaine in her pockets that belonged to her son. Six "bindles" of cocaine were found in one pocket, and five in another. [26]

Blue Bird argued that she did not voluntarily consent to the entry into the motel room. The court first rejected the claim that probable cause was needed to knock on the door, citing to cases holding that the police do not violate the Fourth Amendment when they enter the curtilage for the legitimate purpose of seeking voluntary conversation or consent to search.[27] As to the finding of a voluntary consent, the Court said that "[w]hile a police attempt to 'knock and talk' can become coercive if the police assert their authority, refuse to leave, or otherwise make the people inside feel they cannot refuse to open up . . . in this case there are no facts that would show that Blue Bird had reason to feel she had to open up. The encounter happened in mid-day, Terviel did not command her to open the door, nor was there any suggestion that his knocking was unusually persistent. . . . The district court found that Blue Bird opened the door of the motel room of her own accord, and that finding is not clearly erroneous."[28] The district court had included as factors in its decision that Blue Bird answered the door on her own accord, that she was not in custody when she gave the officer

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[26] *United States v. Spotted Elk*, 548 F.3d at 649. There were other searches involved in the case, but for purposes here the search of Blue Bird's room goes to the consent issue.

[27] *Jardines* would not affect the result, as there is no curtilage of a motel room. See e.g. *Sanders v. Commonwealth*, 772 S.E.2d 15, 22 (Va. App., 2015) (walkways outside of motel rooms do not form a "curtilage" of the rooms).

[28] *United States v. Spotted Elk*, 548 F.3d at 655.

permission to enter the room, that the officer never raised his voice or threatened Blue Bird, and that Blue Bird was a mature adult who was familiar with the workings of the criminal justice system.[29]

In the present case, the situation is similar, except there is more. Frederick and Van Doorne are corrections employees with the Kent County Sheriff's Department. Each answered the door of their own accord, and neither was in custody when consent was given. The officers did not threaten either, and nothing indicates that voices were raised. Both defendant are mature adults. Moreover, both were given Miranda warnings, though not in custody, and each signed written consent forms that included a written warning that they were not required to given consent—something not required in order for consent to be valid[30]—but were doing so of their own free will. The trial judge found that in each case there was no indication of coercion, intimidation, or deception, and that the consents given were given with free will. Nothing suggests that the timing of the requests was in any way used to coerce consent or that it had the effect. In each case, the defendants had subjective reasons for allowing the consent, such as fear of a possible job action—though no threats of any sort of this nature were made—and/or that they had done nothing wrong and had nothing to hide. The defendants were not motivated by any coercive act of the officers, there being none. "'[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact,' *Schneckloth v. Bustamonte* . . .which we review for clear error. . . . A factual finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

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[29] *United States v. Spotted Elk*, 548 F.3d at 655-656.

[30] See *Schnecklothe v. Bustamonte*,

mistake has been committed.'"[31] There is no basis to find that the trial judge's conclusions based on a totality of the circumstances that the consents given were voluntary were clearly erroneous.

Though the Court's order does not ask the question, are the searches invalid even if based on voluntary consent if the entries themselves to seek consent were improper because of their timing? As amicus has argued, if the timing is found problematic, then a technical trespass occurred, but not a violation of the Fourth Amendment, there being no purpose to gain information from the premises through the fact of the entries, but a purpose to seek consent to search. There is no doctrine of "fruit of the technical trespass" where there is no constitutional violation of which amicus is aware, and even statutory violations do not result in suppression unless the legislature has indicated that suppression should result.[32]

Moreover, this is not a case where some constitutional violation occurred, such as an illegal search, which was then leveraged to gain consent, as by confronting the individual from whom consent is sought with evidence from the prior improper action. Rather, here, even if the entry onto the curtilage to knock on the doors and request consent is viewed as a Fourth Amendment warrantless search, the voluntary consents are, in the circumstances, independent of that action.[33]

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[31] *United States v. Murray*, ___F.3d ___, 2016 WL 1697082 (2016) at 3. And see *People v. Shaw*. 188 Mich. App. 520 (1991); *People v. Farrow*, 461 Mich. 202, 208-209 (1999).

[32] See e.g. *People v. Hawkins*, 468 Mich. 488, 500 (2003) ("T]he drastic remedy of exclusion of evidence does not necessarily apply to a statutory violation. Whether the exclusionary rule should be applied to evidence seized in violation of a statute is purely a matter of legislative intent").

[33] Cf. *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1987) (following officers' illegal initial entry, a subsequently obtained valid warrant could provide an independent source for the search and seizure).

In *United States v. Calhoun*[34] a controlled delivery of a kilogram of cocaine was made after its discovery in a package by a UPS employee. Calhoun answered the door, identified herself by the name on the package (a different name than her own), signed for the package, and received it. She was immediately arrested, and other officers entered the apartment and conducted a warrantless "sweep" that discovered no evidence. Calhoun was allowed back inside the apartment at her request, and given her Miranda rights. She agreed to answer questions, and also consented to a search of the apartment, signing a consent form. During the consent search a shotgun was found under the bed, where Calhoun had told them it was, and documents were also seized.

The court held that the warrantless sweep of the apartment that occurred before the consent search was improper under the Fourth Amendment. But "[b]oth sides agree[d] that no evidence was obtained as a direct result of the illegal sweep."[35] The court said that "Calhoun's consent to the search was voluntary as evidenced by her freely signing the consent form and by the testimony of the officers, and that the consent "was not obtained on the basis of any information garnered during the illegal search."[36] The consent supplied an independent source. To Calhoun's claim that the government nonetheless benefitted from the unlawful sweep because it was an element in "creating a coercive atmosphere that led to her consent," the court observed that Calhoun after her arrest and before the search and seizure of the evidence was read her Miranda rights and signed a form consenting to the search. The district court's finding that the consent was voluntary was not clearly

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[34] *United States v. Calhoun*, 49 F. 3d 231 (CA 6, 1995).

[35] *United States v. Calhoun*, 49 F. 3d at 234.

[36] *Id.*

erroneous, and, said the court, "made the subsequent warrantless search of her apartment legal."[37] If constitutional illegality occurred here in the entry onto the curtilage to seek consent, it was more innocuous than that in *Calhoun*. As in that case, the evidence here was discovered independent of any alleged illegality by the voluntary consent of each defendant.

E. Conclusion

In neither case here did an improper search occur, as the entries onto the curtilage were proper, and, even if trespasses because of the time at which they were made, were not searches, as the officers, though hoping to search, hoped to do so if their purpose in entering of seeking consent to search was fruitful. If not—if consent was not given—they understood they had to leave. Consent was voluntarily given, and the findings of the trial court in that regard are not clearly erroneous. And even if the entries are found to be improper, even constitutionally so, under the facts here the consents given were not coerced by the entries, nor were the entries leveraged in some way to gain consent. The evidence is admissible.

[37] *United States v. Calhoun*, 49 F. 3d at 235.

Relief

Wherefore, amicus respectfully request that this Court affirm the Court of Appeals.

Respectfully submitted,

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